APPENDIX A

IN THE SUPREME COURT OF THE STATE OF COLORADO

GEORGE WESTERBERG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, *Petitioner*,

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN AND THE STATE GRAND JURY, *Respondents*.

25779

Original Proceeding

On consideration of the pleadings and arguments herein, it is hereby ordered that the rule to show cause heretofore issued in this action be, and it hereby is, discharged.
By the Court, February 20, 1973.

APPENDIX B

No. 25779

GEORGE WESTERBERG, individually and on behalf of others similarly situated, *Petitioner,*

v.

THE DISTRICT COURT in and for the SECOND JUDICIAL DISTRICT and the STATE GRAND JURY, *Respondents.*

February 20, 1973

Original Proceeding

En Banc — Rule Discharged

Mr. Justice Erickson delivered the Opinion of the Court.

This original proceeding arises out of the same factual setting that we dealt with in *People ex rel. Dunbar* v. *District Court,* ... Colo. ..., 500 P.2d 819 (1972). Briefs have been filed, and a record has been lodged which reflects the developments which have occurred since the case was last before us. We now deny the relief requested by the petitioner.

Certain grand jury witnesses have petitioned for a hearing on their claim that the court-approved wiretap which was used in the early investigative stages of this case was improperly and unlawfully obtained. These witnesses in his proceeding seek to avoid answering questions which may be based, in whole or in part, upon information obtained through the use of the court-approved wiretaps. In *People ex rel. Dunbar* v. *District Court, supra,* we held that the district court prematurely ordered a suppression hearing when the motion was made after a witness was under subpoena, but before the witness appeared, refused to testify, and was cited for contempt.

At this point in the present proceeding, the witnesses who seek relief on their motion to suppress have been granted immunity from prosecution, pursuant to the provisions of 1969 Perm. Supp., C.R.S. 1963, 154-1-18. Even though granted immunity, the witnesses refuse to testify and claim that the questions which have been asked are based upon information which was obtained by means of an illegal wiretap. The precise posture of this controversy is that the witnesses, in order to contest the legality of the wiretaps, seek discovery of the wiretap order which was issued by a Justice of this Court, together with the application and underlying affidavits which the Justice relied upon when he issued the wiretap order. The question before us is limited to search and seizure issues under the Fourth Amendment and does not involve self-incrimination under the Fifth Amendment. U.S. Const. amend. IV and amend. V; Colo. Const. art. II, § 7 and § 18. *See Kastigar* v. *United States,* 406 U.S. 441, 92 S.Ct. 1653, 31 L.Ed. 2d 212 (1972), and *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed. 2d 234 (1972), for an analysis of the rights of the petitioner after he has been granted immunity from prosecution.

The witnesses claim that they should not be forced to risk contempt proceedings without a ruling on the legality of the electronic surveillance that preceded the grand jury investigation. In support of their position, the witnesses claim that they have the statutory right to discovery of the documents supporting the order, pursuant to 1971 Perm. Supp., C.R.S. 1963, 39-24-2(9). The Attorney General, in his answer, claims that the petitioners are again premature in their request for discovery of the material relating to the wiretap. He asserts that the petitioners can only obtain a hearing on the legality of the wiretap after they have been cited for contempt and seek to defend their contemptuous acts by showing the illegality of the investigation. *See Gelbard* v. *United States,* 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972).

Constitutional issues are before us which involve the balancing of conflicting constitutional rights and procedures. The petitioners would have us look solely to the Fourth Amendment right of privacy and the right of every person to be protected against unreasonable searches and seizures. The Attorney General points to the function of the grand jury as a charging body and the need to grant the grand jury freedom in its investigation of crime. He contends that to require a suppression hearing when there has been a court-authorized wiretap, before a grand jury witness can be asked a question, would seriously impede the effective use of the grand jury.

In *Gelbard* v. *United States, supra,* the Supreme Court held that a grand jury witness in a federal contempt proceeding may raise the defense that the questions which were propounded to him were based on an unauthorized and illegal wiretap. The witnesses in the *Gelbard* case refused to answer questions which they claimed were based on illegal wiretaps and were thereupon cited for contempt. In *Gelbard,* the Supreme Court held that a witness could not be held in contempt under the provisions of 28 U.S.C. 1826(a) for refusing to answer a question which was based on information obtained by an unauthorized and illegal wiretap. In examining the issues, the Supreme Court dealt with the interpretation of the provisions of 18 U.S.C. 2510-2520 [also 3504]. The *Gelbard* decision did not explicitly reach the constitutional issues which are before us. The outside boundaries established by *Gelbard* are that discovery cannot be withheld after contempt proceedings have been instituted against a grand jury witness. The issue before us is narrower and is limited to the determination of whether discovery must be afforded prior to the time that the grand jury witness is cited for contempt.

Two Circuits have considered the question which we now face. The First Circuit has held that a motion to suppress is not available to a grand jury witness who challenges the

constitutionality of an investigative wiretap until after he is cited for contempt. *Cali* v. *United States*, 464 F.2d 475 (1st Cir. 1972). The result reached by the First Circuit is predicated on the fact that a grand jury cannot function efficiently if it is interrupted by lengthy suppression hearings. In judging the rights of a grand jury witness to an immediate hearing on his claim that a court-ordered wiretap was illegal against the need for efficient grand jury procedures, the First Circuit concluded that the requirement of the grand jury must take precedence.

The Sixth Circuit, however, did not find that a contempt citation was a necessary prerequisite to a motion to suppress and granted a grand jury witness the right to a hearing on his motion to suppress after he was subpoenaed and claimed that the questions which the grand jury propounded were based upon unlawful electronic surveillance. *United States* v. *Callandra*, 465 F.2d 1218 (6th Cir. 1972). The Sixth Circuit's opinion is based on the deterrence of unlawful electronic surveillance.

To us, the reasoning of the First Circuit is persuasive, and we are not swayed by the arguments which were made and sustained in the Sixth Circuit. A grand jury has long been a means for ferreting out crime and for providing the innocent with protection against unwarranted charges. To permit every witness who appears before a grand jury to file a motion to suppress and have it determined before he testifies would be to frustrate the grand jury process. Adequate protection is afforded the witness by the requirement that the court examine all the facts before imposing a contempt sanction.

Accordingly, the witness's claims are premature, and we, therefore, discharge the rule to show cause.

Mr. Chief Justice Pringle and Mr. Justice Day dissent.

Mr. Justice Groves does not participate.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF COLORADO

25779

GEORGE WESTERBERG, individually and on behalf of others similarly situated, *Petitioner,*

v.

The District Court in and for the Second Judicial District and the Honorable Neil Horan and the State Grand Jury, *Respondents.*

Original Proceeding

On consideration of the petition of petitioner for rehearing in said cause, it is this day ordered that said petition be, and the same hereby is, denied.

By the Court. En Banc. March 12, 1973.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF THE ATTORNEY GENERAL FOR AN EX-PARTE ORDER FOR WIRETAPPING CASE NUMBER ONE BEFORE MR. JUSTICE JAMES K. GROVES

Order

Pursuant to the provisions of 1969 Perm. Supp., C.R.S. 1963, 40-4-30, on January 6, 1971, the undersigned justice of the Colorado Supreme Court issued an electronic surveillance order, upon an application of the Attorney General of the State of Colorado. The order was in effect for a period of thirty days, commencing on January 6, 1971.

On February 5, 1971, the undersigned justice issued an extension order for electronic surveilance, upon an application of the Attorney General of the State of Colorado. The extension order was in effect for a period of thirty days. Communications through Denver, Colorado, telephones having numbers 936-5772, 777-1629 and 777-1819 were intercepted from January 18, 1971, until March 7, 1971, at 12:01 a.m.

IT IS HEREBY ORDERED that notice of the foregoing matters be given to the following:

Anthony C. Mulligan, also referred to as Anthony J. Mulligan, with residence at 2650 South Green Court, Denver, Colorado, and offices at 360 Acoma Street, Denver, Colorado

Mrs. Anthony J. Mulligan, whose residence is 2650 South Green Court, Denver, Colorado

George Westerberg with offices at 360 Acoma Street, Denver, Colorado

Helen G. McAbee whose office is at 360 Acoma Street, Denver, Colorado

IT IS FURTHER ORDERED that notice be given by serving each of the above named individuals personally with a copy of this order.

It is further ordered that James G. Jordan, an agent of the Colorado Bureau of Investigation, is hereby designated as the person to make service of such notices.

Done this 14th day of April, 1971.

s / James K. Groves
Justice, Colorado Supreme Court

I do hereby certify that the foregoing is a full, true and correct copy of that certain order issued by me on this 14th day of April, 1971.

Witness my hand and seal of the Supreme Court of the State of Colorado.

/s/ James K. Groves
Justice, Colorado Supreme Court

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

IN THE MATTER OF THE STATE GRAND JURY

Motion to Suppress

COMES NOW each of the following persons; Paul Welch, Russel Sims, Lew Stone, Bob Lamping, Richard Dye, Roy Nylander, Leroy Gauthier, George E. Westerberg, Guy Van Portfliet, Anthony Mulligan, Ed Boetel, Al Ferguson, Oliver Nelson and Beatty, who are witnesses under subpoena issued by this Court and move this Court to direct the special prosecutor, appointed by the Attorney General or any witness, investigator or any other person not to disclose to the grand jury, refer to, or to direct any questions to any witness based upon information or evidence obtained from any wiretap, eavesdrop or electronic surveilance, or any information or evidence derived therefrom.

AS GROUNDS THEREFORE, IT IS STATED

1. That a certain order entered April 14, 1971 by Supreme Court Justice James K. Groves was served upon Anthony C. Mulligan and George Westerberg, witnesses named above, a copy of which is attached hereto as exhibit A.

2. That the Order purports to give notice to the parties named therein that certain unspecified electronic surveilance was conducted from January 6, 1971 and continuing for 30 days, and that thereafter the said electronic surveilance was extended on February 5, 1971 for an additional 30 days.

3. That based on the Order set forth in exhibit A each of the persons named above believe that the office and telephones of the Northern Colorado Building and Construc-

tion Trade Council were subjected to wiretap, electronic surveilance and eavesdrop.

4. That each of the persons named above have had reason to telephone or receive telephone calls from the offices of the said trade council or to visit the said offices during the time of the electronic surveilance and therefore have reason to believe that their communications have been intercepted and recorded without their knowledge or consent.

5. That office of the Attorney General has failed to comply the mandatory provisions of C.R.S. 1963, 40-4-30 (9) and that by reason thereof any such information may not be disclosed to the grand jury.

6. That in securing permission to conduct the electronic surveilance commencing on January 6, 1971, and permission to extend the surveilance for an additional 30 days commencing on February 5, 1971, the Attorney General failed to comply with the provisions C.R.S. 1963, 40-4-30 (2) and (6), thereby making the electronic surveilance unlawful.

7. That the Order of the Court authorizing the electronic surveilance beginning on January 6, 1971, and the extension thereof were not entered in accordance with C.R.S. 1963 40-4-30 (4), (5) and (6), thereby making the electronic surveilance unlawful.

8. That the electronic surveilance referred to in exhibit A violated the rights of each of the above named witnesses guaranteed by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Articles II, Section 7, Article II, Section 10, Article II, Section 18, and Article II, Section 25 of the Constitution of the State of Colorado.

9. That as witnesses before the Grand Jury, the petitioners may have no other opportunity to raise the issue

of the violation of their constitutional rights, and the other matters raised herein.

Respectfully submitted,

MacDonald & Fattor
By /s/ James Fattor
Attorneys for the Petitioners
555 Capitol Life Center
Denver, Colorado 80203
266-3841

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

IN THE MATTER OF THE STATE GRAND JURY

Order

The Court having before it the motion of certain witnesses now under subpoena to appear before the above-captioned Grand Jury to produce certain petitions and orders authorizing electronic surveillance and the court having heard argument of counsel and being fully advised;

FINDS, that copies of said petitions and orders are necessary for a proper determination of the motions now before the Court, and it is therefore,

ORDERED that certified copies of the record in the proceedings entitled

> "In the Matter of the Application of the Attorney General for an ex parte Order for Wiretapping. Case Number One Before Mr. Justice James K. Groves".

be produced and made a part of these proceedings.

DONE & SIGNED this 16th day of May, 1972.

BY THE COURT:
/s/ Neil Horan, Judge

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO EX REL.
DUKE W. DUNBAR, ATTORNEY GENERAL, *Petitioner*

VS.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN, CHIEF JUDGE THEREOF, *Respondents*

Petition

COME NOW the People of the State of Colorado, upon the relation of the Attorney General and petition this court to make and enter an order directing the respondent to show cause why the respondent should not be prohibited from conducting a hearing upon certain motions presently pending before the District Court in and for the Second Judicial District. As grounds for this petition it is averred as follows:

1. Pursuant to a petition filed by the Attorney General, a State Grand Jury was duly empanelled on May 1, 1972, by the Honorable Neil Horan, Chief Judge of the District Court in and for the Second Judicial District.

2. Subsequent to the empanelling of the State Grand Jury, subpoenas were served upon various witnesses in order to compel their attendance to give testimony before the State Grand Jury.

3. Upon being served with such subpoenas, certain witnesses filed various motions before the District Court on or about May 10, 1972, asserting that they have been subjected to wiretap surveillance conducted pursuant to orders of Supreme Court Justice James K. Groves, and requesting that the District Court afford them a hearing in order to determine whether the evidence obtained thereby should be suppressed and the Attorney General be prohibited from disclosing the contents of said wiretap to the State Grand

Jury and from questioning any of such witnesses based upon the evidence so derived. Copies of said motions are attached hereto and incorporated herein.

4. Upon the filing of said motions on or about May 10, 1972, the undersigned and counsel for the witnesses appeared before the Chief Judge at which time it was stipulated that wiretap surveillance was conducted pursuant to the orders of Justice Groves and, that during the period of the interception, communications of certain witnesses, namely George E. Westerberg, Guy Van Portfliet, Anthony Mulligan, and Oliver Nelson, were in fact overheard. The District Court then continued the matter for further hearing on May 16, 1972.

5. On May 16, 1972, the District Court conducted a hearing on the question of whether the witnesses had standing to challenge the sources of the People's evidence prior to appearing to testify before the State Grand Jury. At the conclusion of said hearing the Honorable Neil Horan ruled that the witnesses had such standing and entered an order for the production of the record pursuant to which the wiretap surveillance was conducted. The court further ordered that a hearing on the merits of the witnesses' motions be had on June 16, 1972, at 2 p.m. A transcript of said hearing and a copy of the order of the District Court are attached hereto and incorporated herein.

6. It is the People's position that the District Court is proceeding without, and in excess of its jurisdiction in entertaining a motion to suppress evidence filed by a witness before a grand jury. Neither the Fourth Amendment to the United States Constitution, Article II, Section 7 of the Colorado Constitution nor any statutory authority or rule of court can be said to confer upon such witnesses the right to litigate, prior to testifying before a grand jury, the question of the validity of a search and seizure conducted by electronic surveillance or otherwise.

7. Petitioner therefore urges that the District Court, in ordering a hearing into the validity of the electronic sur-

veillance, is acting without, and in excess of its jurisdiction. Moreover, unless the respondent court is prohibited from conducting such a hearing, it is reasonably anticipated that other witnesses to be subpoenaed before the State Grand Jury will join in the motions heretofore filed or will file separate but similar motions. If the District Court is allowed to proceed, it is likewise anticipated that motions to suppress evidence will be filed by other witnesses subpoenaed before the various county and special grand juries empanelled throughout the State of Colorado. Therefore, the issues presented by the instant matter are not isolated but constitute a matter of immediate public concern.

8. Petitioner is without an adequate and speedy remedy at law to test the propriety of the District Court's actions in ordering such a hearing and to prevent reapplication of the court's ruling in matters involving other witnesses before the State Grand Jury and witnesses before county and special grand juries throughout the State of Colorado. Unless the District Court is prohibited from proceeding with the hearing which has been ordered, it is submitted that the end result of the District Court's action will be constant disruption of grand jury investigations, unnecessary expense and delay, and a severe hampering of the grand jury as an investigative body.

9. For the foregoing reasons, petitioner respectfully requests this court to exercise its supervisory authority over the respondent court and accept jurisdiction of this case and to order the District Court to show cause as prayed above.

Respectfully submitted,

Duke W. Dunbar
Attorney General

By /s/ Richard T. Spriggs
Assistant Attorney General
1550 Lincoln Street
Denver, Colorado 80203
Telephone: 892-2268

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO EX REL. DUKE W. DUNBAR, ATTORNEY GENERAL, *Petitioner*,

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN, CHIEF JUDGE THEREOF, *Respondents*.

25584

Order

Upon consideration of the petition of the People of the State of Colorado Ex Rel the Attorney General of the State of Colorado for a show cause order, it is this day ordered that a rule to show cause issue out of this court commanding the respondent to answer in writing and show cause within fifteen days from service of such rule why the relief requested in the prayer of said petition should not be granted.

It is further ordered that the petitioner have fifteen days from receipt of the answer within which to reply.

It is further ordered that all proceedings herein be stayed until further order of this court.

BY THE COURT, EN BANC, June 8, 1972.

Mr. Justice Groves not participating.

IN THE SUPREME COURT OF THE STATE OF COLORADO

The People of the State of Colorado Ex Rel. Duke W. Dunbar, Attorney General, *Petitioner,*

v.

The District Court in and for the Second Judicial District and The Honorable Neil Horan, Chief Judge thereof, *Respondents.*

Original Proceeding

25584

On consideration of the pleadings and briefs filed herein, it is this day ordered, adjudged and decreed that the rule to show cause heretofore issued in this cause be, and it hereby is, made absolute. By the Court. En Banc. August 28, 1972.

No. 25584

THE PEOPLE OF THE STATE OF COLORADO EX REL. DUKE W. DUNBAR, ATTORNEY GENERAL, *Petitioner,*

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN, CHIEF JUDGE THEREOF, *Respondents.*

August 28, 1972

Original Proceeding

En Banc — Rule Made Absolute

Mr. Justice Erickson delivered the Opinion of the Court.

As part of an investigation of fires at construction sites, the Attorney General empaneled a state grand jury and subpoenaed certain witnesses. These witnesses answered that they had received the statutory notice of having been overheard subject to a wiretap authorized under 1971 Perm. Supp., C.R.S. 1963, 39-24-2. The witnesses then filed a motion in the district court for a hearing to determine the legality of the wiretap and to suppress the intercepted con-

versations. The district court granted the hearing. The Attorney General then sought a writ of prohibition from this Court to prevent the district court from holding a suppression hearing at this time. We issued a rule to show cause why the writ of prohibition should not be granted and now issue a writ of prohibition.

The Attorney General argues that no witnesses should be able to challenge any of the evidence before the grand jury. He contends that a suppression hearing of the type contemplated by the witnesses would destroy the effectiveness of the grand jury and would totally eliminate secrecy of grand jury proceedings if the investigation depended in any way upon evidence secured by wiretaps or electronic eavesdropping. The witnesses reply that the Colorado wiretap statute, 1971 Perm. Supp., C.R.S. 1963, 39-24-2 gives them a remedy of suppression in "any proceeding" and that important Fourth Amendment rights should be promptly vindicated. However, as the matter is presently postured, the issues raised are not subject to review. No witness has been questioned. No witness has refused to answer any question propounded to him by or before the grand jury. No witness has been cited for contempt. No charges have been filed against any witness. Furthermore, the wiretap in issue was only used after a court order was obtained. No showing has been made that the court order which permitted the electronic surveillance was invalid or was not properly followed. What these witnesses assert is a right to a hearing on a wiretap that *might* be illegal and to suppress intercepted contents that *might* be used in the future in some manner. Therefore, the order granting the witnesses a suppression hearing was premature under the circumstances.

Grand jury proceedings have been traditionally free of technical rules. *Lawn* v. *United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). The remedy of exclusion of evidence or suppression has been held to apply to the trial once an indictment has been returned but has not been extended to the indictment. *Blue* v. *United States,* 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). *See also,*

Costello v. *United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), which held that an indictment which was only supported by hearsay evidence did not constitute a due process violation. Under the federal statute, 18 U.S.C. 2515, the Supreme Court, in *Gelbard* v. *United States,* — U.S. —, — S.Ct. —, 33 L.Ed.2d 179 (June 26, 1972), permitted a grand jury witness cited for contempt under the provisions of 28 U.S.C. 1826(a) for refusal to answer questions based on intercepted telephone calls to question the legality of the interception in the defense of the contempt charge where there was no court order authorizing the interception (n. 22). As the case is presented to us, the facts do not fall within the parameters set out in the *Gelbard* case. Mr. Justice White, concurring in *Gelbard* v. *United States, supra,* commented on this very problem in the context of the federal statute:

> "Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best. . . ."

Accordingly, the witnesses are not entitled to a suppression hearing, and the district court is not to conduct a suppression hearing at this time.

The order to show cause is made absolute.

Mr. Chief Justice Pringle concurring in the result.

Mr. Justice Day and Mr. Justice Groves not participating.

IN THE SUPREME COURT OF THE STATE OF COLORADO

Motion for Discovery

IN THE MATTER OF THE APPLICATION OF THE ATTORNEY GENERAL FOR AN EX PARTE ORDER FOR WIRE-TAPPING CASE NUMBER ONE BEFORE JUSTICE JAMES K. GROVES

1. This motion is made for the following persons:

a. Anthony C. Mulligan, George Westerberg, and Helen McAbee. Pursuant to an order dated April 14, 1971, and signed by Justice Groves, each of these persons was notified that their conversations were intercepted by electronic surveillance by means of some electronic device on the telephones having the numbers 936-5772 and 777-1629 and 777-1819 during a period from January 18, 1971, to March 17, 1971.

b. Paul Welch, Russel Sims, Lew Stone, Bob Lamping, Richard Dye, Roy Nylander, Leroy Gauthier, Guy Van Portfliet, Ed Boetel, Al Ferguson, and Oliver Nelson, each of whom had on a number of occasions made calls to and received calls from the telephones numbered 777-1629 and 777-1819 during the time indicated above and therefore they have reason to believe that their private conversations were intercepted by agents of the state without their knowledge and consent.

2. This motion is made pursuant to 1969 Perm. Supp. CRS 1963, 40-3-30 (8) (d) (iv).

3. That the persons named in paragraph 1 move that Justice Groves make available to each of them through their attorneys the following:

a. Copy of the application of the Attorney General for the order authorizing the electronic surveillance and all affidavits, written documents, and a transcript of the testimony, if any, used to support the application.

b. A copy of the order authorizing the electronic surveillance beginning January 6, 1971.

c. A copy of the application of the Attorney General for an extension of the electronic surveillance from February 5, 1971, to March 7, 1971, and all affidavits, written documents, and a transcript of the testimony, if any, used in support of the application.

d. A copy of the order authorizing an extension of the electronic surveillance from February 5, 1971, to March 7, 1971.

e. A copy of the transcript of the intercepted communications.

f. An opportunity for counsel to hear the recording of the intercepted communications.

g. With respect to each recording, the dates the interception was made whether or not the interception was made by wire-tap on a telephone or by the use of some electronic surveillance device, and if by telephone wire-tap, an identification of the telephone being tapped, and if not by telephone wire-tap, an identification of the electronic device being used and where it was located and the person, if known, whose conversation is intercepted.

4. As grounds therefore, the movants state:

a. That although they have been advised that electronic surveillance was made pursuant to Court order, and that certain conversations were intercepted, they have not yet seen any order or the application in support thereof, and therefore have had no opportunity to determine whether or not the order was valid.

b. That the orders for surveillance were obtained *ex parte* and therefore have not been tested by an adversary proceeding.

c. That the movants have been subpoenaed before the Grand Jury and have reason to believe that questions put

to them were based upon information contained from the electronic surveillance.

d. That if the electronic surveillance conducted by the state was unlawful, either because the order was not properly obtained or because the surveillance was not conducted in accordance with the order, the movants have a right not to be compelled to answer questions based upon information directly or indirectly obtained from such unlawful electronic surveillance, such right being guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and by Article II, Sections 7, 10, 18, and 25 of the Constitution of the State of Colorado.

e. That it is impossible for the movants to make an intelligent judgment as to whether the electronic surveillance was valid unless the information sought by them in this motion is made available to them.

f. That the interests of justice and due process to which the movants are entitled demand that the information sought in this motion be made available to them and their attorneys.

g. That these movants have previously filed a motion to suppress the wire-tap evidence on the grounds that the statute was not complied with and on the grounds that the wire-tap violated their constitutional rights. The Supreme Court, in Case Number 25584, decided August 28, 1972, ruled that the motion was premature; however, in the argument before the Supreme Court the Attorney General in his rebuttal argument advised the Supreme Court that the movants had a right to obtain a copy of the Order and Application by filing a motion for discovery of them pursuant to the statute referred to in paragraph 2 above.

5. This motion should be construed as a special appearance only for the purpose of presenting the motion in accord with the statute and the movants do not admit that

the Supreme Court or a Justice thereof has jurisdiction with regard to the application or order authorizing a wire-tap or electronic surveillance.

MacDonald & Fattor
By /s/ James Fattor
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266-3841

IN THE SUPREME COURT OF THE STATE OF COLORADO

Ruling on Motion for Discovery of Anthony C. Mulligan, et al Filed on September 6, 1972

The motion for discovery is denied.

By my order two sealed packages were delivered to the clerk of this court for safekeeping. One package contains the wiretap surveillance recordings made under orders previously entered in this matter. The other package is an envelope containing the following:

1. Application of the Attorney General for an ex-parte order for electronic surveillance dated January 5, 1971.

2. An affidavit attached to and supporting the said application.

3. An electronic surveillance order entered by me on January 5, 1971.

4. Eight reports as to the surveillance signed by the Deputy Attorney General.

5. Application for an extension of the surveillance order dated February 5, 1971.

6. Affiffidavit attached to and supporting the last mentioned application.

7. My order dated February 5, 1971, extending the order for electronic surveillance.

8. Affidavit dated April 14, 1971, containing information which might support a portion of my order of April 14, 1971, a copy of which was served upon some of the present movants.

9. The last mentioned order.

10. Proofs of service of copies of the order last mentioned, dated April 22, 1971.

I have some appreciation of the rather frustrating position in which the movants find themselves. Counsel for the movants cannot form their own opinion or seek a judicial determination as to whether there was probable cause for issuance of the surveillance order unless the contents of the application therefor and of the supporting affidavit are disclosed.

This motion has been filed solely under 1969 Perm. Supp., C.R.S. 1963, 40-4-30(8)(d)(iv), albeit the motion erroneously states 40-3-30(8)(d)(iv). This subsection of the statute provides that the granting or denial of a motion such as the one here is within the discretion of the judge. I am not unmindful that, all things being equal, the spirit of Crim. P. 16 suggests that such a motion be granted.

The Attorney General has objected to the granting of the motion for a number of reasons. Included among these reasons are that (1) "the disclosure of the information sought would potentially disclose the identity of a confidential informant and engender an unnecessary risk of retaliation against such persons (sic);" and (2) "the granting of the requested discovery at this time would serve to further hinder, obstruct and delay the investigation of the State Grand Jury." The undersigned finds that these two grounds are sound with respect to the request for disclosure of the original application for a wiretap surveillance order and for the disclosure of the affidavit supporting that application. The undersigned is acutely aware of the possibility that disclosure of the contents of the affidavit might result in retaliation against more than one person. The second reason is sound with respect to the request for discovery of the original surveillance order. The undersigned finds that the harm which might result from disclosure of the application, affidavit and order far outweighs the possible benefit of disclosure to the movants.

Without disclosure of the application, affidavit and order, no determination of probable cause can be made. The main

thrust of this motion to disclose is to provide movants with sufficient information for a determination of probable cause. While there may be some value to the movants in obtaining disclosure of the recorded conversations, this disclosure does not approach the importance of disclosure of the documents on which the finding of probable cause was based.

The eight reports relating to the surveillance purport to disclose statements made in the recorded conversations which were regarded as material to the surveillance order. Disclosure of these reports might hinder and obstruct the investigation of the Grand Jury, although to a lesser extent than is involved in the original application, affidavit and order.

I have concluded that, in the light of the fact that the movants have thus far been precluded from obtaining information as to probable cause, neither the eight reports nor the recordings themselves should be disclosed. The remaining documents in the sealed envelopes could be of little, if any, value to the movants.

In support of their motion for disclosure, the movants have cited *Gelbard* v. *United States,* 92 S.Ct. 2357, 33 L.Ed. 2d 179 (June 26, 1972), and *Alderman* v. *United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. Neither of these cases require the granting of the instant motion.

There has not been any attempt to approach the question of remedies available to the movants either now or after further proceedings unfold.

Dated this 22nd day of September, 1972.

/s/ James K. Groves
Justice

thrust of this motion to disclose is to provide movants with sufficient information for a determination of probable cause. While there may be some value to the movants in obtaining disclosure of the recorded conversations, this disclosure does not approach the importance of disclosure of the documents on which the finding of probable cause was based.

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